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IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO., *ET AL.*,
Petitioners,

v.

HOWARD A. ENGLE, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Florida

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN H. BEISNER
(*Counsel of Record*)
MATTHEW M. SHORS
SCOTT M. EDSON
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

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MOTION FOR LEAVE TO FILE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America (the "Chamber") hereby moves this Court, pursuant to Rule 37.2, for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari in this case.* Petitioners have consented to the filing of this brief, and correspondence reflecting petitioners' consent has been lodged with the Clerk. Respondents, however, would not provide consent except on conditions unacceptable to the Chamber.

The Chamber is the world's largest federation of business companies and associations, with an underlying mem-

* The attached brief addresses only petitioners' first question presented. The Chamber also supports review with respect to the second question.

bership of more than three million business and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The Chamber and its members have a strong interest in seeking review of the Supreme Court of Florida's decision in this matter, which accorded preclusive effect to generic findings of wrongdoing covering an entire industry over a half-century, under the rubric of "issues" classes. The decision below threatens the ability of automobile, healthcare, chemical, and numerous other companies to exercise their due process rights to defend themselves against potentially bankrupting class action and mass tort judgments.

Given the profound effect the decision below will have on the Chamber's members absent review, the Chamber requests leave to file an *amicus* brief in support of petitioners.

Respectfully submitted,

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN H. BEISNER
(*Counsel of Record*)
MATTHEW M. SHORS
SCOTT M. EDSON
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

August 15, 2007

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John H. Beisner et al.,
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TABLE OF AUTHORITIES
(continued)

Page(s)

Lester Brickman,
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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief as *amicus curiae* in support of petitioners.[1]

STATEMENT

This case involves a question of exceptional importance to the business community: whether courts facing class actions or mass tort proceedings may permissibly conduct "generic" product liability trials and then afford preclusive effect to generalized findings of wrongful conduct in separate cases brought by individual plaintiffs with disparate claims.

This case was tried as a class action involving as many as 700,000 current and former smokers asserting various personal-injury claims against members of the tobacco industry. The trial involved numerous products and a half-century's worth of conduct by many defendants. The trial court justified its trial plan on the grounds that the jury was capable of deciding purportedly "common" questions applicable to the class as a whole. Yet the trial had virtually nothing to do with conduct "common" to *all* (or even most) of the 700,000 class members' claims. The court did not require *any* of the evidence it allowed plaintiffs to present to the jury to be linked to the circumstances of any particular named plaintiff or absent class member—let alone ensure that the evidence was relevant to the claims of *all* of those class members. A myth of commonality was instead created on the theory that all of the claims were "smoking-related," and that myth was

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[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part. No person or entity, other than the Chamber and its members, made a monetary contribution to the preparation and submission of this brief.

supported by including such a wide swath of conduct that many of the class members could link their claims to *some* piece of evidence introduced, even though no single act of alleged wrongdoing was, or could be, shown to have affected all or even most of the class members.

At the conclusion of the generic phase, the jury decided numerous abstract questions, including, for example, whether the defendants were "negligent." Faced essentially with a thumbs-up, thumbs-down vote on a half-century of conduct by an entire industry (and apparently asked only to find one, undefined, act of "negligence" per defendant over the class period), the jury sided with plaintiffs. The intermediate appellate court reversed the judgment and ordered the class decertified. The Supreme Court of Florida (the "Florida Supreme Court"), however, reinstated much of the judgment by adopting the "pragmatic solution" of prospectively decertifying the class while conferring upon most of the generic jury findings "res judicata effect" in any future lawsuit filed by *any* class member—rendering the prospective decertification meaningless.

SUMMARY OF ARGUMENT

The Florida Supreme Court's decision in this case illustrates a growing and alarming trend among courts to respond to mass tort litigation by authorizing "generic" trials involving disparate claims, thereby permitting a single jury answering a few abstract questions to resolve whether multiple defendants breached tort duties to hundreds or thousands (or, as here, hundreds *of* thousands) of plaintiffs all at the same time. The court below held that the jury's comparatively contentless findings of wrongdoing concerning conduct spanning an entire industry over more than a half-century were entitled to preclusive effect as to the claims of as many as 700,000 personal-injury plaintiffs who could allege only that *different* acts by *different* defendants breached *different* tort duties to *different* people at *different* times causing *dif-*

ferent injuries. The Florida Supreme Court's decision departs sharply from traditional norms of fair adjudication, elevates expediency above due process, and places businesses in peril of being coerced into global settlements—even where they have no actual liability. The Court should grant review.

1. Declining to evaluate its decision under traditional notions of fairness, the court below termed its ruling a "pragmatic solution." But even if pragmatism could otherwise justify such a sharp departure from due process (and it cannot, as we explain below), the decision below is neither pragmatic nor a "solution" to any problems associated with mass tort litigation. On the contrary, it exacerbates those problems by encouraging attorneys to file marginal or even frivolous claims in a mass tort proceeding on the hopes that, if enough claims are filed, it will then become permissible for trial courts to ignore the traditional dictates of due process by approving mass trials involving thousands of plaintiffs and numerous defendants. The prospect of such mass trials will effectively require most or all defendants, facing pressure from the financial markets, to settle all claims, regardless of merit. The result of the decision below is therefore more (not less) litigation, as well as an enormous cost to both American business and the principles of due process of law.

2. Unfortunately, although the procedure employed below represents a sharp departure from traditional notions of fair adjudication, it is by no means unique in the modern mass tort era. Recent years have seen a growing trend in lower courts of adopting "generic" proceedings to resolve disparate issues related to disparate claims. Because the settlement pressure such proceedings create typically means that all claims are settled prior to trial, this case presents a rare opportunity for the Court to provide much needed post-trial guidance on the constitutional limits imposed on class actions and mass tort proceedings. This Court has already

carefully mapped out those limits in the context of class action settlements and class action notices. The time has come for the Court to articulate the limits due process imposes on analogous cases that are actually litigated to trial.

3. The importance and frequency of the question presented is enough to warrant review. But the decision below is also wildly incorrect on the merits. The "generic" product liability trial proceeding employed below, involving thousands of plaintiffs asserting inherently individualized and disparate personal-injury claims, violated due process in at least two distinct ways. *First*, it permitted plaintiffs to litigate not on the merits of their own concrete claims, but through an imaginary "perfect plaintiff" that had been affected by each alleged act of misconduct, even though no such person actually exists. *Second*, by conflating the conduct of numerous defendants, it prevented any particular defendant from adequately defending itself.

Although any generic trial involving the disparate claims of personal-injury plaintiffs raises these concerns, the decision below brings them into sharp focus. That decision holds that generic findings, unconnected to the claims of any particular plaintiff, are to be accorded preclusive effect so that subsequent plaintiffs can use those findings to show that the defendants breached tort duties as to them. In affording preclusive effect to certain findings in this case, the Florida Supreme Court implicitly rejected the defendants' argument that the generic verdict cannot be preclusive in a future lawsuit brought by a particular plaintiff because it is impossible to know whether the prior jury based its verdict on evidence having *anything* to do with any identifiable plaintiff—or, indeed, whether the original jury may have *exonerated* the petitioners as to any particular conduct.

In addition to the arguments made in the petition, the Florida Supreme Court's decision to afford preclusive effect to the jury verdict threatens due process for at least three

other, related reasons. *First*, future juries will have no reasoned basis for properly apportioning fault, and will thus be left to arbitrarily guess at how to do so under Florida's pure comparative fault regime. *Second*, by declaring *prospectively* that preclusive effect will be accorded to generic findings, the court below departed from the traditional practice of permitting the second court—the court aware of the facts of both cases—to decide whether the issues of the second case were decided in the first case. In so doing, the court sought to ensure that facts will be established by estoppel without any case-specific inquiry into whether estoppel is appropriate under a concrete set of facts. *Third*, because the Florida Supreme Court recognized that the case was not fairly tried as a class action, decertifying the class also should have led to vacating the verdict. Instead, the court adopted a course that is functionally indistinguishable from approving class certification.

ARGUMENT

As the petition explains, the generic product liability proceeding adopted below—both in itself and as applied prospectively to future lawsuits—sharply deviates from traditional modes of fair adjudication and deprives petitioners of their due process right to fairly defend themselves. The Court should take this opportunity to provide much needed guidance regarding the due process limits of generic product liability trials.

I. THE DECISION BELOW WILL STRAIN COURTS AND HARM BUSINESSES.

The decision below relies on the premise that a "pragmatic" solution was needed to the problem of tobacco litigation in Florida state courts. As we explain below, that is not the proper benchmark when fundamental constitutional rights are at stake. But even if it were, the court's pragmatism is fundamentally misguided. Far from solving the problems associated with mass-tort litigation, the decision below

is an invitation to abuse. More lawsuits, more procedural shortcuts, and more harms to American businesses inevitably flow from the decision below.[2] In particular, the decision below ensures that lawyers will have incentives to file meritless claims—indeed, even potentially to create meritless mass tort *proceedings*—in order to overrun a court system, thereby justifying a "pragmatic" mass trial deciding in one fell swoop the liability of an entire industry with respect to thousands of claimants.

It is now well understood that the stakes involved when mass litigation is consolidated for joint resolution at trial place defendants under intense pressure to settle even baseless claims. *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low."); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (recognizing that applying adverse "generic liability" verdict as to all plaintiffs would require defendant to settle all outstanding claims, even though defendant had previously won twelve of thirteen individual lawsuits); Fed. R. Civ. P. 23 advisory committee notes ("An order granting certification [of a class] . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."); Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 Wm. & Mary Envtl. L. &. Pol'y Rev. 243, 252 (2001) ("the aggregation of claims often pressures a defendant or defendants to settle claims irrespective of their merits"); Richard O. Faulk et al., *Building a Better Mousetrap? A New Approach to Trying Mass Tort*

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[2] Although the court purported to limits its "pragmatic" solution to the "unique" "procedural posture" of the case below (*see* Pet. App. at 30a-31a), no reasoning in the decision below cabins its effects to tobacco litigation alone.

Cases, 29 Tex. Tech L. Rev. 779, 790 (1998) (same).

The consolidation of claims against multiple defendants only compounds that pressure by creating a "rush to settle" through "a classic prisoners' dilemma[.] Although defendants realize that they should bargain as a group with plaintiffs' counsel, each defendant also understands that it can gain an advantage by settling early, and that it will be disadvantaged if others settle first (the sucker's payoff)." *See Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 89, 99 (prepared statement of William N. Eskridge, Jr., Professor, Yale Law School).

Plaintiffs' lawyers, well aware of the phenomenon just explained, will read the decision below to hold that every new claim added to a mass proceeding makes the prospect of a generic trial not only more risky for the defendants, but also more attractive to a court. As these lawyers will recognize, the combination of vastly increased liability exposure and diminishing rights will often overwhelm a defendant into settling all claims asserted against it. Claims that could never survive on their own are thus carried along by their parasitic attachment to generic product liability proceedings. The result is more lawsuits, more judicial costs, and more extorted settlements, straining the courts and unsettling American business. Given the importance of the question presented, the Court should grant review.

II. THE PETITION PRESENTS A RARE OPPORTUNITY FOR THIS COURT TO PROVIDE MUCH NEEDED GUIDANCE ON A GROWING ISSUE.

1. Unfortunately, the decision below is not the only recent example of a trial court adopting a "generic" product liability trial as a "pragmatic solution" to a class action or other mass tort proceeding. Rather, there is a growing trend to attempt mass tort aggregation through generic trial pro-

ceedings involving disparate claims related to similar products. *See, e.g.*, *Scott v. Am. Tobacco Co., Inc*, 949 So. 2d 1266 (La. Ct. App. 2007) (smokers' class action); *Ex parte Flexible Prods. Co.*, 915 So. 2d 34 (Ala. 2005) (approving plan for generic product liability trial in product liability litigation); *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419 (W. Va. 2002) (approving consolidation of thousands of asbestos plaintiffs for generic product liability determinations); *Ex parte Monsanto Co.*, 794 So. 2d 350, 357 (Ala. 2001) (finding "no abuse of discretion [and] no basis for issuing a writ of mandamus" where trial judge intended to "hear, at one proceeding, the evidence relating to liability issues as to all claims and then, if the liability issue was decided adversely to Monsanto, to try each individual plaintiff's causation and damages issues"); *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 305 (W. Va. 1996) (approving plan to consolidate thousands of asbestos claims into two-phase trial where first phase would adjudicate general negligence questions); *ACandS, Inc. v. Godwin*, 667 A.2d 116, 120 (Md. 1995) (approving phased trial plan that determined whether each of six asbestos defendants "was negligent and/or strictly liable" and applied finding to individual claims by 8,549 plaintiffs); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 475 (5th Cir. 1986) (approving class trial of thousands of asbestos cases to determine common issues regarding state of the art defense); *Cimino v. Raymark Indus., Inc.*, 739 F. Supp. 328, 330 (E.D. Tex. 1990) (approving class trial against numerous defendants on issues of product defectiveness and punitive damages); *Wilson v. Johns-Manville Sales Corp.*, 107 F.R.D. 250, 253 (S.D. Tex. 1985) (approving consolidated trial of "50 pending asbestos cases by conducting a single consolidated trial on the issues of product defectiveness and punitive damages").

Reported decisions, moreover, do not remotely tell the whole story; aggregated proceedings that induce global set-

tlements are far more often unreported and, frequently, never appealed. *See generally* John H. Beisner et al., *One Small Step for a County Court . . . One Giant Calamity for the National Legal System*, Civ. Just. Rep. (Apr. 2003) (discussing nationwide trend of aggregating claims of unrelated plaintiffs into mass actions). If this Court denies certiorari, for example, petitioners will be forced to return to the trial courts in Florida, where they will face up to 700,000 claimants armed with generalized findings that the petitioners engaged in malfeasance. The pressure will be immense to settle before that army of claimants is unleashed.[3] Under these circumstances, the Court's immediate review is not only appropriate, it is necessary.

2. Without question, the explosion of mass torts in recent decades has strained America's courts. Facing hundreds or thousands of claims involving the same or similar products, courts have experimented with different litigation models. Ultimately, however, those experiments must pass the test of fundamental fairness. This Court has held consistently that the burdens of aggregate litigation do not alter the requirement of individual justice. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 816-17 (1999) (reversing certification of settlement class, in part, due to conflict among class members that precluded adequate representation); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-28 (1997) (same); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985) (constitutional choice-of-law calculus not altered by difficulty of adjudicating large number of cases). Nevertheless, the Court has not applied those principles to a litigated class action or a mass tort proceeding. This case presents an ideal vehicle for doing so. The Court should grant review.

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[3] Alternatively, if petitioners decide to litigate those claims, then the courts will be saddled with thousands of lawsuits, each of which will be vulnerable to a future ruling by this Court invalidating the generic liability proceeding. (*See* Pet. at 18-19.)

III. THE IRREGULAR PROCEDURE ADOPTED BELOW DENIES PETITIONERS THE OPPORTUNITY TO DEFEND THEMSELVES.

The Florida Supreme Court adopted two unusual procedures, each of which deprived petitioners of their due process rights. *First*, the court blessed a plaintiff-free, generic product liability proceeding in which individual defendants were put to task for the conduct of their entire industry over the course of a half-century. *Second*, the court permitted subsequent plaintiffs to rely on generic misconduct findings, the bases of which can only guessed at, to establish that each of the petitioners breached duties and committed wrongs as to *them*. Both of these procedures stripped petitioners of the opportunity to fairly defend themselves.

A. The Generic Wrongdoing Trial Employed Below Contravenes Due Process.

The generic product liability trial approved below violates petitioners' due process rights for at least two reasons.[4]

1. First, the sprawling proceeding permitted plaintiffs to piece together a fictitious "perfect plaintiff" who was exposed to both every product and every instance of "misleading" conduct. Evidence was admitted in the generic proceeding without any showing that it could be linked to the circumstances of any particular class member—let alone all class members. Nor did the trial court even require the evidence to be linked to the facts of the *named* plaintiffs' cases. Each class member's allegation that he or she sustained a *particular* injury from smoking a *specific* type of cigarettes at a *discrete* period of time was thus lost in the shuffle. In-

[4] The constitutionality of the trial procedures is necessarily linked to the Florida Supreme Court's preclusion ruling because, as this Court has recognized, a "State may not grant preclusive effect in its own courts to a constitutionally infirm judgment." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982).

stead, the jury was presented with a Frankenstein's plaintiff who saw every allegedly misleading advertisement, smoked every brand of cigarettes over the entire class period, and sustained every imaginable injury, but was nonetheless unaware that cigarette smoking might carry any potential side effects.

As the Fourth Circuit has aptly observed, plaintiffs in such an unbounded proceeding

> enjoy[] the practical advantage of being able to litigate not on behalf of themselves but on behalf of a "perfect plaintiff" pieced together for litigation. Plaintiffs [are] allowed to draw on the most dramatic alleged misrepresentations . . . with no proof that those "misrepresentations" reached them. And plaintiffs [are] allowed to stitch together the strongest . . . case based on language from various [documents], with no necessary connection to their own . . . rights.

Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 344 (4th Cir. 1998).

Due process simply does not permit litigation through imaginary surrogates; it instead mandates that each claim be evaluated on the actual underlying facts. *See, e.g., In re Fibreboard Corp.*, 893 F.2d 706, 710-11 (5th Cir. 1990) (recognizing due process limits on allowing fictional litigation to substitute for actually litigating each claim). As the Second Circuit has explained, "[t]he systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation." *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992); *see also In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) ("considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial" (internal quotation marks omitted)); *Malcolm v. Nat'l*

Gypsum Co., 995 F.2d 346, 350 (2d Cir. 1993) (same).[5]

2. At the same time, by permitting plaintiffs to try their cases against multiple defendants based on evidence common to no one, the proceeding became so large and confusing that it was impossible for any defendant to present a meaningful defense. Evidence inadmissible to one defendant was admitted as to others. *See Cain v. Armstrong World Industries*, 785 F. Supp. 1448, 1457 (S.D. Ala. 1992) ("As the evidence unfolded in this case, it became more and more obvious to this Court that a process had been unleashed that left the jury the impossible task of being able to carefully sort out and distinguish the facts and law of thirteen plaintiffs' cases that varied greatly in so many critical aspects. In the final analysis, the Court is convinced that the defendants did not receive a fair trial."). The complexity, length, and scope of the proceeding precluded the jury from sorting through the evidence and various defenses, and tailoring a verdict to each party's culpability. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (due process guarantees "the aggrieved party the opportunity to present his case and have its merits fairly judged"). Gearing the trial to determine the col-

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[5] Similarly, the decision below caused a procedural revision of substantive law by replacing the plaintiff's burden to show that the defendant failed to adequately warn *him or her* with an inquiry into whether the defendant adequately warned an imaginary plaintiff not before the court. *See Talquin Elec. Coop. v. Amchem Prods. Inc.*, 427 So. 2d 1032, 1033 (Fla. Dist. Ct. App. 1983) ("The [generic] adequacy of the label is immaterial . . . [where] a plaintiff is in fact warned by the label."); *see also, e.g. Hon v. Stroh Brewery Co.*, 835 F.2d 510, 513 (3d Cir. 1987) (applying Pennsylvania law) ("If the product's risks were known or should have been known to the user, liability cannot be imposed upon the manufacturer merely because the manufacturer allegedly has failed to warn of that propensity." (internal quotation marks and alteration omitted)); *Strasser v. Transtech Mobile Fleet Serv., Inc.*, 613 N.W.2d 142, 155 (Wis. Ct. App. 2000) ("In the circumstances of this case," where plaintiff knew of relevant danger, "Transtech's failure to warn Strasser about the absence of safety treads in the new ladders was not negligence.").

lective liability of all the defendants over more than fifty years effectively barred any particular petitioner from adequately defending itself.[6]

3. For all of these reasons, the generic liability trial involving the disparate claims of hundreds of thousands of plaintiffs lacked any resemblance to the adversarial testing that stands as the hallmark of fairness in Anglo-American law, belonging instead to the inquisitorial system of continental Europe. "As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). The Court has mandated that state civil trials operate "according to the settled course of judicial proceedings." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 30 (1991); *see also Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("It is precisely the historical practices that *define* what is 'due.'"). Allowing a single jury to determine that an industry of defendants engaged in "misconduct" for fifty

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[6] A related problem is that the industry-wide trial conducted below, in which a single jury decided abstract questions about the entire industry, blurred substantive standards to the point of unconstitutional vagueness. The generic trial's open-ended nature necessarily caused it to deteriorate from an inquiry into whether a specific defendant breached a tort duty to a specific plaintiff (or even a set of identically situated plaintiffs) into a referendum on an entire industry's conduct over fifty years. In answering generalized yes-or-no questions based on that proceeding, the jury was left little option but to opine on whether the industry was "good" or "bad" overall. It is difficult, if not impossible, to discern how the defendants were to structure their conduct in advance so as to avoid the guilt-by-association findings of wrongdoing that necessarily resulted from the generic proceeding, and the substantive tort standards effectively applied in the proceeding thus lacked the constitutionally-mandated discernable line distinguishing permissible and impermissible conduct. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (due process mandates that state provide "the kind of notice that will enable ordinary people to understand what conduct it prohibits").

years—without any requirement to connect that misconduct to a specific plaintiff—is simply contrary to law. Courts, state or federal, are not free to adopt such profound distortions of the processes of civil justice. *See, e.g., Logan*, 455 U.S. at 432 ("because minimum procedural requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate").[7]

B. Generic Findings Of Nondescript Wrongdoing Cannot Be Applied In Subsequent Lawsuits.

As the petitioners explain, generic findings of wrongdoing are by definition nondescript, and due process does not permit such findings to be given preclusive effect in future litigation brought by specific plaintiffs. (*See* Pet. at 12-18.) In addition to the arguments made in the petition, the court's decision to afford preclusive effect to the jury's decision is at odds with due process for three additional but related reasons.[8]

First, the court below held that future juries may use the generic liability findings to apportion fault, as required under Florida's pure comparative negligence regime. (*See* Pet. at

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[7] That is not to suggest that consolidation for generic wrongdoing determinations is never appropriate. A proceeding designed to determine, for instance, whether a single plane crash that killed each plaintiff's decedent was caused by a single defective bolt manufactured by the defendant, or whether a specific batch of allegedly tainted medicine ingested by several plaintiffs contained an adulterant when it left the defendant's factory, would not raise the same due process problems as the proceeding below. The infirmity here arises because the class members' claims stem from different alleged acts of wrongdoing by different people in different places at different times.

[8] As explained above, the fact that the generic proceeding did not result in a constitutionally valid verdict also precludes the application of collateral estoppel. *See supra* at 10-14; *see also supra* at 10 n.4.

App. 27a.) *See also West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 90 (Fla. 1976) (recognizing that Florida's pure comparative fault regime requires apportioning liability under ordinary causation principles). Other than guessing, however, it is impossible for future juries to allocate responsibility in individual cases based on the *generic* findings another jury made when assessing the conduct of an entire industry over the course of fifty years. For example, the prior jury found:

- "that the defendants placed cigarettes on the market that were defective and unreasonably dangerous";
- "that the defendants concealed *or* omitted material information not otherwise known or available knowing that the material was false *or* misleading *or* failed to disclose a material fact concerning the health effects *or* addictive nature of smoking cigarettes *or* both"; and
- "that all the defendants are negligent."

(Pet. App. at 44a (emphasis added).) The Florida Supreme Court did not even attempt to explain how a second jury can possibly allocate fault rationally between a *particular* plaintiff and one of the petitioners based on those generic findings (which fail to answer important questions such as *what* cigarettes were "defective," or *what act* by each defendant was "negligent"). *See Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931) (recognizing that "interwoven" issues "cannot be submitted to the jury independently . . . without confusion and uncertainty, which would amount to a denial of a fair trial"); *see also La Plante v. Am. Honda Motor Co.*, 27 F.3d 731, 738 (1st Cir. 1994) ("A new trial may not . . . be limited to fewer than all the issues unless it clearly appears that the issues to be retried are so distinct and separable from the other issues that a trial of those issues alone may be had without injustice."); *Lewis v. Am. Cyanamid Co.*,

715 A.2d 967, 975 (N.J. 1998) ("Because the issues of plaintiff's comparative negligence and defendants' liability intertwine, it would be inappropriate to remand one without the other.").

Second, the Florida Supreme Court's *prospective* ruling that the findings will have preclusive effect represents a departure from traditional practice, and seems to oblige trial courts to accord the generic findings preclusive effect without ever inquiring into whether preclusion is appropriate on the facts of a given case. Ordinarily, the second court—which knows *both* what the earlier finding was *and* how it is to be applied in the later case—determines whether to apply collateral estoppel in a given case. *See* Charles Alan Wright et al., Federal Practice and Procedure § 4413 (2002) (noting "general rule that a court cannot dictate preclusion consequences at the time of deciding a first action," except where it seeks to limit preclusive effect); *cf., e.g.*, Restatement (Second) of Judgments § 27 cmt. c (1982) (discussing context-specific factors courts should use in comparing issue to be precluded to issue previously adjudicated in order to determine whether issues are materially identical). When it decreed that the generic findings will be accorded collateral estoppel effect, by contrast, the court below had (at most) only half of the relevant information. Without any way to predict precisely the concrete factual circumstances in which future plaintiffs will seek to apply the generic findings, the court below was ill-positioned to determine whether preclusion will be appropriate in any specific future case.

Third, although the court below prospectively decertified the class, its decision to retain most of the generic findings and allow former class members to rely on them renders that decertification decision meaningless. If the court had reinstated the certification order, then "generic liability" would have been established by all class members against all petitioners, and individual trials on causation, damages, and

comparative fault would still have been required in order to resolve the outstanding claims by the unnamed class members. There is therefore *no* difference in effect between that outcome and the decision below. Under the court's decision, too, "generic liability" is established by all (former) class members against all petitioners, and individual trials on causation, damages, and comparative fault are required to resolve the outstanding claims by the unnamed (former) class members.

Having decided that continued class treatment was improper, the Florida Supreme Court was not free to ignore the logical consequences of that decision. The court should have recognized instead that, once the class was decertified, the generic "verdict"—and the evidence upon which it was based—could not stand. Instead, the court compounded that error by holding that the verdict would not only stand but could *also* be used by thousands of claimants in future trials.

* * *

In sum, this case provides an excellent vehicle for resolving a recurring issue important to both lower courts and businesses facing mass tort litigation. The Court below dispensed with traditional notions of fair adjudication by sacrificing petitioners' due process rights on the alter of pragmatism. Certiorari is warranted.

CONCLUSION

For the foregoing reasons, and for the reasons stated by petitioners, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN H. BEISNER
(*Counsel of Record*)
MATTHEW M. SHORS
SCOTT M. EDSON
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

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